IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 24, 2007 Session

STATE OF TENNESSEE v. ISAAC EUGENE JONES, III

Appeal from the Criminal Court for Hamilton County
No. 240630 Douglas A. Meyer, Judge

No. E2006-00983-CCA-R3-CD - Filed January 7, 2008

A jury in Hamilton County convicted the Defendant, Isaac Eugene Jones, III, of one count of second degree murder, and the trial court sentenced him to twenty-five years in prison. On appeal, the Defendant contends that the trial court erred when it: (1) failed to conduct a *Momon* hearing; (2) excluded testimony about the ultimate issue of insanity; (3) allowed the State to close its argument with a prejudicial statement; (4) admitted evidence of his prior bad acts; (5) failed to instruct the jury on mutual combat, diminished capacity, and insanity; and (6) failed to consider applicable mitigating factors when sentencing him. Finding no error, we affirm the trial court's judgment.

Tenn. R. App. 3 Appeal; Judgment of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which J.C. MCLIN and D. KELLY THOMAS, JR., JJ., joined.

Ardena J. Garth and Donna Robinson Miller, Chattanooga, Tennessee (on appeal); and Karla Gothard, Mary Ann Green, and Richard A. Heinsman, Chattanooga, Tennessee (at trial) for the Appellant, Isaac E. Jones, III.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; John H. Bledsoe and Renee W. Turner, Assistant Attorneys General; William H. Cox, III., District Attorney General; Barry Steelman, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

A. Trial

This case arises from the killing of police officer Julie Jacks on May 6, 2002, for which the Defendant was indicted on a charge of first degree murder. At his trial, the relevant evidence included:[1]

The Defendant spent most of his childhood in the Watts district of Los Angeles, California, where he lived with his mother, until she committed suicide, and then with his father. He occasionally spent time in Chattanooga, Tennessee, with his paternal grandparents and extended family. After graduating from high school in Los Angeles, the Defendant moved to Chattanooga to live with his grandparents permanently, where he enrolled in the Chattanooga State pharmacy technician program. The Defendant, an A and B student, received a Who's Who award for his scholastic achievements and was admitted to Howard University's pharmacy program.

On May 5, 2002, the Defendant exhibited peculiar behavior causing his family to seek medical assistance for him. His family described his odd behavior, saying that he became "very talkative" and "hyperactive," and he kept walking up and down the stairs. Walter Cross, the Defendant's minister, testified that the Defendant spoke with him that day about "having headaches and . . . hearing voices." Cross also stated that the Defendant cried while repeating, "everything's all right now." Because of the Defendant's strange behavior, his family took him to Memorial Hospital for an examination. While at the hospital, the Defendant complained only of abdominal pains and not feeling "right." His treating physician, Dr. Manzari, who did not know of the family's history of mental illness, considered the Defendant's admitted recent marijuana usage and surmised that the Defendant simply exhibited symptoms of stress. Dr. Manzari released the Defendant with the instructions to drink plenty of water and to not take his final exam the next morning.

After the hospital visit, the Defendant's aunt, Tina Carter, brought the Defendant to her house and had her ex-husband, Robert Curtis Carter, Jr., stay at the house with her because, as she told Robert, she "felt there was something . . . wrong." Tina described the Defendant as "very talkative" and said that "he couldn't keep still." Robert Carter testified that the Defendant would "start a subject [of conversation], but led to no conclusion." Additionally, he stated that, "[the Defendant] was fidgety and erratic. He couldn't sit down, . . . he couldn't concentrate on anything, but he wanted us to know that he had a problem." Tina Carter added that the Defendant revealed that he "heard the voices and [he knew] who killed Tupac."[2] Robert Carter stayed awake with the Defendant all night, during which the Defendant drank a lot of water and did not sleep. The next day, Robert Carter took the Defendant to Chattanooga State to take his final exam.

Several witnesses testified that, when the Defendant entered the testing room, he loudly greeted everyone with a "Good Morning!", which was unusual for him. Trish Cole, the library technician at Chattanooga State, described the Defendant as normally "very quiet, timid, very

[1] Because the Defendant does not challenge the sufficiency of the evidence, the factual summary is presented in the light most favorable to the State.

[2] Tupac Amaru Shakur was a well-known American music artist and social activist killed by an unknown shooter in 1996.

reserved, no opinions about anything. [The Defendant] only spoke if he was spoken . . . to." Moreover, the Defendant was not dressed in accordance with his normally tidy appearance. After taking the exam, the Defendant turned it in, claiming he had "aced it." He then walked out of the room and saw Dr. Nancy Watts, the director of the pharmacy technician program at Chattanooga State. The Defendant could not answer any of Dr. Watts's questions about the exam, and he made a quick move to hug her, which caught her off-guard. Dr. Watts asked for someone to call security, because she "could tell that everything was starting to escalate" with the Defendant, who was "saying things that made absolutely no sense," cursing, and spitting. Dr. Watts testified that, as she talked to him, the Defendant's "behavior and . . . body language and gestures [became] much more agitated and exaggerated" than they were when he completed his exam.

When campus security arrived, the Defendant attempted to run from the two officers, but they successfully tackled him. Dr. Watts testified that she stressed to the chief of campus security that she thought the Defendant "was a danger to himself and others," meaning he should be taken to a hospital for a mental evaluation. Tommy Lee Hayes, a lieutenant with the Chattanooga State Police, escorted the Defendant outside the building and helped restrain him until the Chattanooga Police Officers arrived. Officer Hayes testified that Defendant was "fidgety, repeated[ly] spitting, and at times [he would] just scream out, just hollering." The Defendant was handcuffed, put into a Chattanooga Police Department cruiser, and taken to Parkridge Hospital for a mental evaluation.

At Parkridge Hospital, the Defendant waited for several hours on a gurney in the hallway by the nurse's station. Tina Carter, who was at the hospital with him, said the Defendant kept counting backwards from the number nine and asking, "What's the answer?" Nurse Christina Sanders described the Defendant as agitated and yelling. The Defendant recognized that he was at a hospital, and he knew the month and year but did not know which hospital, the day of the week, or numerical day of the month. Nurse Sanders noted the Defendant "seemed to be responding to some sort of stimuli that wasn't me, it was something else." Donna Smith, a patient at Parkridge when the Defendant was there, said she saw the Defendant's eyes "going all over." At one point, Nurse Sanders had the Defendant unhandcuffed, so he could provide a urine sample. The Defendant was then moved into a private room with his aunt. While in the room, the Defendant's pants fell down, and he kept saying that he could not pull them back up onto his waist. A short time later, the Defendant ran out of the hospital, wearing only socks, boxer shorts, and a t-shirt. Subsequently, the hospital reported to the police that the Defendant had escaped.

Upon hearing over the police scanner that a hospital patient escaped, Officer Julie Jacks notified dispatch that she would respond to the call, since she was nearby working a traffic accident. The 911 dispatch tapes were played at trial for the jury. On the tapes, Officer Jacks is heard responding to the call and then reporting that she was in a fight with someone. She is last heard yelling out, "My God! He's trying to get my gun!" A witness to the event saw the Defendant wrestle with Officer Jacks in the street and eventually throw her down onto the street. The Defendant then shot Officer Jacks seven or eight times and slid the gun into the sewer. When Officer Matthew Rogers responded to the situation, he saw the Defendant "standing over the top of [Officer Jacks], looking at her." Officer Rogers asked the Defendant to raise his hands, at which

point, the Defendant began to run. The Defendant was subsequently tackled, handcuffed, and maced. Officer Stony Morton, who arrived on the scene with Officer Rogers, heard the Defendant yelling, "I hope I killed the bitch. I'm going to kill all of y'all. I'm going to make sure I get all of y'all. I hope the bitch is dead." The medical examiner subsequently determined that Officer Jacks died on the scene from a gunshot wound to her head.

Officer John Spain arrived on the scene and took control of the Defendant. He recorded his dialogue with the Defendant, and those audio tapes were played at trial. While Officer Spain tried to talk with the Defendant, the Defendant yelled about "salt in the water" and his grandfather having "the keys to heaven," among other incoherent topics. Additionally, the Defendant stated he was left handed, had HIV, and molested his niece, all of which were later deemed false. Near the end of the questioning, the Defendant said, "I give up," and became much more docile.

While at the police station, the Defendant gave an audio recorded statement to Officer Mike Mathis of the Chattanooga Police Department, and the tapes were played for the jury. The Defendant initially waived his rights and then began recounting the prior few days. The Defendant admitted that he heard voices for a few days, he shot Officer Jacks, and he smoked marijuana recently. The police then had the Defendant examined at Memorial Hospital to ensure he was medically safe to put in jail. Dr. Jim Wojcik, the examining doctor, found the Defendant "alert [and] oriented" and said "there wasn't any evidence of drug-induced or alcohol-induced psychosis." He also stated he would not expect someone who was hallucinating at 1:30 p.m. to be "perfectly normal" at 6:00 p.m. From the hospital, the police transported the Defendant to the Hamilton County Jail where he was incarcerated.

While in jail, the Defendant acted strangely and was immediately placed in a suicide cloak.[3] Barbara Hobson, the criminal justice mental health liaison, testified that, for the first few months, the Defendant "was usually nude in his cell, . . . [and seen] flushing his jail uniform, . . . wash[ing] his hair in the toilet, and . . . . constantly smear[ing] feces . . . in his hair . . . . and on his body." The Defendant thought people were trying to poison him, heard voices, and said he could not get this thoughts to "slow down." Dr. Timothy Larson, the Hamilton County jail psychiatrist, documented the Defendant's behavior for several months and noted the Defendant "start[ed] to get confused, [felt] paranoid, [heard] things, [saw] strange lights, and [got a] message from radio and tv. [He] [a]lso ha[d] hallucinations." Dr. Larson diagnosed the Defendant with schizophrenia and began medicating him. After beginning a medication regimen, the Defendant acted much more normally.

Dr. Pamela Auble, a psychologist, and Dr. George Woods, a psychiatrist and forensic psychologist, analyzed the Defendant's responses to specific tests, his behavior, and his family history. Both doctors testified that the Defendant had numerous family members, including his father and mother, who suffered from mental illness, with most suffering from schizophrenia. They explained that, because a person who has one family member with schizophrenia has four to ten times a greater chance of developing schizophrenia, the Defendant was at an increased risk. Both

[3] A suicide cloak is a garment specifically designed so an inmate cannot use it to commit suicide.

doctors also discussed the Defendant's change in behavior before May 6, 2002, as a prodromal phase, where the schizophrenia symptoms began to manifest. They both opined the Defendant was in the midst of a psychotic event on May 6, 2002, when he shot Officer Jacks. Dr. Auble said the medication managed, but did not eliminate, the Defendant's schizophrenic symptoms. Moreover, while the Defendant had fewer symptoms, he still suffered from schizophrenia, a lifelong disease requiring daily medication. The Defendant admitted to both Dr. Auble and Dr. Woods that he heard voices and saw demons. He also admitted that he sensed a demon in Officer Jacks, and he had to kill it before it killed him.

Based on this evidence, the jury convicted the Defendant of second degree murder.

B. Sentencing Hearing

At the sentencing hearing, several witnesses testified, including the Defendant, and numerous letters were sent to the court on behalf of both the victim and the Defendant. Additionally, the Defendant submitted a thorough mitigation report for the court's review. The first witness, Becky Bates, was Officer Jacks' mother, who spoke at length about Officer Jacks' childhood and family. She also explained that Officer Jacks became a police officer to "make a difference, [change] lives for the better," and that she was even awarded the Rookie of the Year award in her department.

On behalf of the Defendant, Gene Coppinger, the security operation lieutenant at Hamilton County Jail where the Defendant was housed, testified that since the Defendant has been medicated, he had not had any disciplinary infractions. Additionally, the Defendant voluntarily and regularly took his medication. Laura Bistrek, who knew the Defendant through church connections and wrote to him regularly, testified about the friendship she developed with the Defendant during his incarceration. Bistrek said she would like the Defendant to come live with her family upon his release. Isaac Jones, Sr., the Defendant's grandfather, testified about how the Defendant's father began treatment in California for schizophrenia and alcohol addiction. He also described the Defendant's rough childhood. Finally, the Defendant testified. He read a letter he wrote himself apologizing to the victim's mother. He admitted that he did not remember May 6, 2002, and assured the court that he took his medication regularly. The Defendant testified that he even sought out the nurses when they skip him for his medication, to ensure that he gets it.

The Defendant signed a waiver for the trial court to sentence him under the new sentencing act. The trial court considered the evidence before it and sentenced the Defendant to twenty-five years in prison.

II. Analysis

The Defendant now appeals, contending that the trial court erred when it: (1) failed to conduct a *Momon* hearing; (2) excluded testimony about the ultimate issue of insanity; (3) allowed the State to close its argument with a prejudicial statement; (4) admitted evidence of his prior bad

acts; (5) failed to instruct the jury on mutual combat, diminished capacity, and insanity; and (6) failed to consider applicable mitigating factors when sentencing him.

A. *Momon* Hearing Requirement

The Defendant claims on appeal that the trial court erred by not asking him if he wanted to testify at trial, which he asserts violated his constitutional right to testify at his own trial. The Defendant raised this issue at the hearing on his motion for a new trial. In response, the State claims that the Defendant waived the right to testify, and, in the alternative, that failure to conduct a *Momon* hearing was not plain error.

Whether the Defendant's constitutional rights were violated is a question of law, and, as such, we review it de novo. *See State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001). Tennessee recognizes that defendants have a right to speak on their own behalf at trial. *Momon v. State*, 18 S.W.3d 152, 161 (Tenn. 1999). Moreover, only the defendant may waive the right to testify and such a waiver may not be inferred or presumed, but instead it must be openly explored. *Id.* at 161-62. To prove that the Defendant's right to testify is not violated, the defense counsel should request a hearing outside the presence of the jury to demonstrate the defendant's waiver of the right to testify has been "knowing[ly], voluntari[ly], and intelligent[ly]" made. *Id.* at 162. No "particular litany" need be used; however, defense counsel must at a minimum show :

> the defendant knows and understands that:
> (1) the defendant has the right not to testify, and if the defendant does not testify, then the jury (or court) may not draw any inferences from the defendant's failure to testify;
>
> (2) the defendant has the right to testify and that if the defendant wishes to exercise that right, no one can prevent the defendant from testifying;
>
> (3) the defendant has consulted with his or her counsel in making the decision whether or not to testify; that the defendant has been advised of the advantages and disadvantages of testifying; and that the defendant has voluntarily and personally waived the right to testify.

Id. These procedures are "prophylactic measures which are not themselves constitutionally required." *Id.* at 163. Therefore, failure to follow the guidelines will not be enough to show that a defendant was deprived of the constitutional right to testify "if there is evidence in the record to establish that the right was otherwise personally waived by the defendant." *Id.*

If a constitutional violation is proven, then the State bears the burden of showing the violation was harmless beyond a reasonable doubt. *Id.* at 167. To help the courts determine whether the error was harmless, the Tennessee Supreme Court adopted the following factors that the courts should consider:

(1) the importance of the defendant's testimony to the defense case;

(2) the cumulative nature of the testimony;

(3) the presence or absence of evidence corroborating or contradicting the defendant on material points;

(4) the overall strength of the prosecution's case. As previously stated, the goal of harmless error analysis is to identify the actual basis on which the jury rested its verdict.

Id. at 168 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)).

On appeal, the Defendant contends that the procedural guidelines enumerated in *Momon* were not followed, and that he did not otherwise waive his right to testify. The Defendant correctly asserts that the trial transcript shows no record of a *Momon* inquiry. At the motion for new trial hearing, the Defendant's trial counsel apologized for not inquiring on the record about the Defendant's desire to testify. Counsel agreed that they did not intend to call the Defendant to testify. The trial court then questioned the Defendant about this issue. When the trial court asked the Defendant if he knew he had a right to testify, the Defendant said that he did and elaborated, "I think I would have testified, because me and [my attorney] . . . had a conversation that, that she said that I didn't have to testify to what I [did not] remember on May the 6th, but I could have testified to other things." The Defendant asserted the "other things" he would have testified about included his life before May 6, 2002, his post-graduation plans, and his mental state before and after May 6, 2002. When the court asked the Defendant why he did not speak to his attorney to make sure he testified, the Defendant responded, "I was waiting for my chance . . . . the trial ended suddenly . . . . and I didn't know the trial was over with until, until the last minute."

Accordingly, it appears that the Defendant was deprived of his constitutional right to testify and there is no evidence in the record to establish that he otherwise personally waived this right. We turn now to decide whether the State has proven that this violation was harmless beyond a reasonable doubt.

First, we address the importance of the Defendant's testimony to the case. The Defendant claimed he would have testified about his life plans, post-graduation plans, and mental state before and after the event, but would not have testified about the shooting on May 6, 2002, because he did not remember it. This testimony would have shed little light, if any, on the relevant events of this case. Additionally, included in this "importance" analysis is a weighing of credibility of the defendant's potential testimony and how it might have impacted the case. *State v. Vaughn,*144 S.W.3d 391, 411 (Tenn. Crim. App. 2003). As "a court of appellate jurisdiction, we are precluded from making judgments of credibility," but must defer to the trial court's findings. *Id*. In this case, after hearing the Defendant's reason for failing to ensure that he testified, the trial court said, "That's hard for me to believe." The trial court also stated to the defense attorneys, "I place very little credit in what your client says. . . . I do not believe him at all." Given this negative assessment of the Defendant's credibility as a witness at the hearing on the motion for new trial, it is reasonable to

assume that similar credibility problems may have arisen for the Defendant had he testified at trial. If so, any potential positive impact of the Defendant's testimony at trial would have been lessened.

We next consider the cumulative nature of the Defendant's testimony. The Defendant's family members testified on his behalf, and they each discussed his demeanor before this incident, his success in academia, and his post-graduation plans. We agree with the trial court's statement that "the Defendant's testimony regarding his mental state before and after the day of the offense would have been cumulative to the comprehensive lay descriptions of his behavior before the offense and less authoritative than the expert descriptions and assessments of his mental state before, on, and after the day of the offense." Thus, we conclude the Defendant's testimony would have been largely cumulative.

The third factor, which addresses the presence or absence of evidence corroborating or contradicting the defendant on material points, is inapplicable because the Defendant did not want to testify about material points. The Defendant only wished to discuss his life plans and not the shooting on May 6, 2002. Therefore, this factor weighs in favor of the error being harmless.

Finally, the prosecution's case against the Defendant was strong. A witness saw the Defendant wrestle Officer Jacks' gun from her and shoot her seven times with it. The police found the Defendant standing over Officer Jacks' body. The Defendant even admitted to the police that he shot her. He argued at trial that he did not have the requisite culpable mental state. The jury partially rejected this contention by finding that the Defendant acted knowingly, and thus convicted him of second degree murder. Furthermore, the Defendant's counsel told the trial court that they never intended for the Defendant to testify.

Based on the analysis of the aforementioned factors, we conclude that, while the Defendant's constitutional right to testify was infringed upon, such infringement was harmless beyond a reasonable doubt. Accordingly, he is not entitled to relief on this issue.

B. Insanity Testimony

The Defendant claims that the definition of insanity, as defined in Tennessee Code Annotated section 39-11-501, and the limitations on the admissibility of evidence about insanity, violated his constitutional right to present a defense. The State argues that the statute has been found constitutional, and it did not impede the Defendant's right to present a defense.

Whether the Defendant's constitutional right to present a defense was violated is a matter of law, thus, we review this issue de novo. *State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001). Tennessee Code Annotated section 39-11-501(c) provides that, "No expert witness may testify as to whether the defendant was or was not insane as set forth in subsection (a). Such ultimate issue is a matter for the trier of fact alone." The Tennessee Court of Criminal Appeals addressed this statutory section in *State v. Perry*, where it applied the statute and elaborated that:

> . . . this court must construe subpart (c) narrowly . . . . Although [it] precludes an expert from testifying that the defendant was, in fact, legally "insane" at the time of the commission of the offense, the expert may testify that the defendant suffered from a severe mental disease or defect. The expert may also state whether the defendant could have appreciated the nature or wrongfulness of his conduct at the time of the offense. . . . [t]he jury must render the ultimate determination as to the effect of mental disease on the defendant's understanding of his conduct at the time of the offense.

13 S.W.3d 724, 742 (Tenn. Crim. App. 1999). The Tennessee Supreme Court upheld the statute, as the appellate court interpreted it, in *State v. Flake*. 88 S.W.3d 540, 551 (Tenn. 2002). Moreover, the Advisory Commission for the Tennessee Rules of Evidence explains that, "One ultimate issue is outside the scope of expert testimony. T.C.A. § 39-11-501 provides that 'no expert witness may testify as to whether the defendant was or was not insane.'" Tenn. R. Evid. 704, Advisory Comm'n Cmts. This Court is bound by the Supreme Court's rulings on the constitutionality of a statute, and, as such, the Defendant is not entitled to relief on this issue.

C. State's Closing Argument

The Defendant next argues that the trial court erred when it allowed the State to argue, over the Defendant's objection, in its closing to the jury that "[f]or you to find that this Defendant is insane, you must believe that he believed that Julie Jacks was a demon." The Defendant claims that such a statement prejudiced the jury against him, and it improperly shifted the burden onto him. The State argues that the prosecutor has great leeway in his closing argument, and he was only arguing inferences based on the evidence put on by the defense, which is permitted. The State also argues that, even if trial court did err, it was harmless error.

We review this issue under the abuse of discretion standard. *State v. Hall*, 976 S.W.2d 121, 157 (Tenn. 1998). "Courts have recognized that closing argument is a valuable privilege afforded to the State and the defense and have afforded wide latitude to counsel in arguing their cases to the jury." *State v. Cleveland*, 959 S.W.2d 548, 551 (Tenn. 1997) (citing *State v. Bigbee*, 885 S.W.2d 797, 809 (Tenn. 1994)). Tennessee Rule of Criminal Procedure 29.1(b) allows a closing argument to address any evidence introduced at trial. In addition to presentations of just the evidence, parties may also argue "reasonable inferences." *State v. Chico McCracken*, No. W2001-03176-CCA-R3-CD, 2003 WL 1618082, at *8 (Tenn. Crim. App., at Jackson, Mar. 24, 2003), *perm. to appeal denied* (Tenn. Sept. 2, 2003). When there is improper argument, the court must test whether the inflammatory statement negatively impacted the Defendant. To measure this impact, five factors should be considered: "(1) the facts and circumstances of the case; (2) any curative measures undertaken by the court and the prosecutor; (3) the intent of the prosecution; (4) the cumulative effect of the improper conduct and any other errors in the record; and (5) the relative strength or weakness of the case." *State v. Goltz*, 111 S.W.3d 1, 5-6 (Tenn. Crim. App. 2003).

Additionally, we have recognized five general areas of prosecutorial misconduct: (1) intentionally misstating the evidence or misleading of the jury on the inferences it can draw; (2) expressing personal beliefs or opinions; (3) inflaming or attempting to inflame the passions or prejudices of the jury; (4) adding outside issues to the guilt or innocence issue; and (5) arguing or referring to outside facts. *Id.* Of course, if there were curative measures taken by the court, such as proper jury instructions, this will likely render the misconduct harmless. *McCracken*, 2003 WL 1618082, at *8 (citing *Zafiro v. United States*, 506 U.S. 534, 540-41 (1993) for the proposition that, "In the absence of compelling prejudice, proper instructions will generally suffice 'to cure any risk of prejudice' when one defendant's counsel argues that the codefendent is the guilty party.").

Applying the factors, we find the prosecutor misstated the law on insanity, and the trial court erred when it overruled the defense objection. To prove an insanity defense, the defendant must prove that, at the time of the commission of the act constituting the offense, he or she was unable to appreciate the nature or wrongfulness of his or her acts, as a result of a mental disease or defect. T.C.A. §39-11-501 (2005). In this case, a successful insanity defense would not necessarily require the jury to accredit that the Defendant believed the victim was a demon. The jury could have concluded the Defendant was unable to appreciate the wrongfulness of his actions because of his schizophrenic psychosis without the jury believing that he saw the victim as a demon. Regardless, the trial court cured any potential error with proper jury instructions. In the jury instructions, the trial court said, "Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and applying the law, but they're not evidence. If any statements were made that you believe are not supported by the evidence, you should disregard them." Additionally, on the topic of insanity, the trial court gave the following instruction:

> Defense, insanity: Defendant has raised the defense that he was insane at the time of the commission of the offense.
>
> A person is not responsible for criminal conduct if, at the commission of the acts constituting the offense, the person, as a result of a severe mental disease or defect, was unable to appreciate the nature of his actions or the wrongfulness of his acts. A mental disease by itself is not a defense. The terms "mental disease or defect," do not include any abnormality manifested only by repeated criminal or otherwise anti-social behavior.
>
> The defendant has the burden of proving the defense of insanity. For you to return a verdict of not guilty by reason of insanity, the defendant must prove both of the following things by clear and convincing evidence:
>
> One, he had a severe mental disease or defect at the time that the acts constituting the crime were committed; and two, that as a result of this severe mental disease or defect, he was not able to appreciate the nature of his actions or to appreciate the wrongfulness of his actions.

This instruction on insanity accurately reflects the law of the insanity defense. *Supra* Section II, E. Furthermore, the instruction also explained the prosecutor's statements were not evidence and the jury may only consider the evidence when making its factual determination. This clear and careful instruction on insanity cured any potential error, eliminating prejudice to the Defendant from the prosecutor's statement in closing argument. As such, the Defendant is not entitled to relief on this issue.

D. Prior Bad Acts

The Defendant claims the trial court erred by admitting evidence that he claimed to molest his niece, smoke marijuana, and be affiliated with a gang. The State argues the defense opened the door to these issues and that the evidence was relevant to a material issue in the case. Generally, Tennessee Rules of Evidence 403 and 404(b) do not allow evidence into a trial when the danger of unfair prejudice substantially outweighs the probative value. Rule 403 applies to evidence in general and Rule 404(b) applies specifically to prior bad acts by the defendant. If the defense asks about a prior bad act or other normally excluded evidence on direct examination, the defense opens the door to the prosecution being allowed to ask about it on cross examination. *State v. Kendricks,* 947 S.W.2d 875, 883 (Tenn. Crim. App. 1996). *See State v. Davidson M. Taylor*, No. W2006-00543-CCA-R3-CD, 2007 WL 3026374, at *4 (Tenn. Crim. App., at Jackson, Mar. 6, 2007) (citing Neil P. Cohen, et al., *Tennessee Law of Evidence* §4.04[4][a] (5th ed. 2005), *no Tenn. R. App. P. 11 application filed*. If the trial court admits prejudicial evidence, as long as it explains its decision, we review under an abuse of discretion standard. *State v. Dubois*, 953 S.W.2d 649, 652 (Tenn. 1997).

1. Molestation

The prosecutor offered evidence about the Defendant's possible molestation of his niece on its case-in-chief through Officer John Spain and the audiotape he made of the Defendant's arrest on May 6, 2002. While Officer Spain was testifying, both the prosecution and the defense questioned him about what they heard on the tape. The relevant testimony is as follows:

> **State:** All right. Would you listen, please, to what we're about to play and we will ask you some questions while the tape is playing? We may stop it at various times and ask you questions about what is being said.
>
> **Spain:** Yes, sir.
>
> . . . . (Taped statement)
>
> **The Defendant:** Tina, Tina Carter
> **Spain:** She'll be along
> **The Defendant:** Got a daughter named Catherine:
> **Spain:** Catherine?
> **The Defendant:** Catherine

Spain: Where they living?
. . . .
The Defendant: On Lexington. I molested her.
Spain: You molested her?
The Defendant: Yeah, when I was 21.
Spain: well, you're 21 now.
The Defendant: I know I'm 21 now.

(Tape paused)

State: He said, "I molested her when I was 21"?

Spain: That's what he said.

Defense Attorney: He said, "I molested her when I was 21, " and you said, "you're 21 now"?

Spain: Right

Later, during the defense's case, Tina Carter testified that the Defendant did not molest her daughter:

Defense Attorney: Okay. I believe you've been made aware of some statements that [the Defendant] made after his arrest?

Carter: Yes.
Defense Attorney: About Catherine?
Carter: Yes
Defense Attorney: Okay. Has anyone from the Chattanooga Police Department or the Department of Social Services ever contacted you about allegations of abuse about Catherine?
Carter: No.
Defense Attorney: Okay. Do you have any concerns yourself that Catherine was ever abused by [the Defendant]?
Carter: No, because she loves him to death, and I don't think anybody could love someone the way she loves him if he had done something cruel to her.

The prosecution later cross-examined Tina Carter on this issue of alleged molestation, asking her numerous questions about it.

The Defendant argues that the prejudice to him outweighed the probative value of the evidence. The State claims that the Defendant never objected to the testimony presented on the

audio tapes and that the Defendant questioned Tina Carter about the molestation before the State did. We agree with the State. Because the Defendant did not object to the molestation testimony offered by the State through Officer Spain, the issue is waived. *See* Tenn. R. App. P. 36(a) (appellate relief generally unavailable when party "failed to take whatever action was reasonably available to prevent or nullify the harmful effect of any error."); *State v. Schieffelbein*, 230 S.W.3d 88, 118 (Tenn. Crim. App. 2007) ("The failure to make a contemporaneous objection constitutes a waiver of the issue on appeal."). As for the molestation testimony elicited by the prosecution from Tina Carter, the defense had already examined her on the issue of the alleged molestation, which opened the door to the prosecution's line of questioning. Tenn. R. Evid. 611(b). The Defendant is not entitled to relief on this issue.

2. Drug Use

The defense claims the trial court erred when it allowed a reference to the Defendant's drug use by prosecution witness Officer Mike Mathis. Officer Mathis took the Defendant's statement at the Chattanooga police station after the Defendant was arrested. This statement was also recorded as an audiotape and played for the jury with no objection by the defense. While being interviewed, the Defendant said, "I smoked some weed a few days ago, but I ain't never smoked no weed like that before." The Defendant claims that the State agreed to only refer to the drug use related to the incident on May 6, 2002, and not any prior usage. The State counters that the Defendant already put witnesses on the stand who said the Defendant did not have a drug problem.

We find that since the Defendant did not object to this testimony he waived the right to bring it on appeal. *Schieffelbein*, 230 S.W.3d at 118; *see* Tenn. R. App. P. 36(a). In the interest of justice, we review this issue on its merits, and we conclude that the testimony at issue was within the scope of allowed testimony, per the trial court's ruling on the motion in limine. The State and the Defense had agreed the State could introduce evidence about the Defendant's drug use pertaining to May 6, 2002. In the testimony at issue, the Defendant spoke about his most recent drug use to explain why he felt so strangely. He thought the drugs he used were to blame, and while he hinted at prior drug use, it was merely to show that his current state was not normal for him. As such, the Defendant is not entitled to relief on this issue.

3. Gang Affiliation

The testimony at issue for the gang affiliation claim is that while cross-examining defense witness Dr. George Woods, the State asked, "Did you consider information that you had that he was affiliated in a gang in Los Angeles?" Dr. Woods answered, "No." This question came after an extensive voir dire of Dr. Woods and after discussing his report about the Defendant, which described the Defendant as "dutiful" and "gentle." The defense argued that any questioning addressing whether Dr. Woods considered the Defendant's gang past was prejudicial. The trial court allowed the question, saying:

> I think maybe the State can go into whether or not he was affiliated with a gang. They can ask that question, because I think the probative value, according to the doctor's statement about it, the probative value does outweigh the prejudice to that extent only, that it's [a] . . . gang affiliation.

The Defendant argues that because his potential gang affiliation was a prior bad act, it could not be admitted without him initially opening the door. Additionally, the Defendant claims that even with admitting the gang affiliation, the trial court failed to give a limited or cautionary warning. Responding, the State argues that it asked the specific question agreed to during a jury-out hearing.

Tennessee's Evidence Rule 405 permits cross examination of character witnesses on the topics of the defendant's prior bad acts. *State v. Nichols*, 877 S.W.2d 722 (Tenn. 1994). In this case, Dr. Woods testified on direct examination by the defense that the Defendant was "dutiful" and "gentle." These descriptions are character references which opened the door to the prosecution examining how well the witness knew the Defendant and if he considered the Defendant's prior gang affiliation when he made these characterizations. The Defendant is not entitled to relief on this issue.

E. Jury Instructions

The Defendant claims that the trial court erred by not giving any instructions on mutual combat or diminished capacity and by not giving the requested insanity instruction. The State argues that the mutual combat instruction has been abrogated and that the trial court properly charged the jury.

A Defendant has "a constitutional right to a correct and complete charge of the law. *State v. Teel*, 793 S.W.2d 236, 249 (Tenn. 1990), *superceded by statute on other grounds as stated in State v. Reid*, 91 S.W.3d 247, 314 (Tenn. 2002). The standard of review is whether the trial court abused its discretion. *State v. Bohanan*, 745 S.W.2d 892, 897 (Tenn. Crim. App. 1987). In 1989, Tennessee revised its criminal code and in doing so, it abrogated the mutual combat charge. According to the Tennessee Supreme Court, "The essence of the doctrine has been incorporated into the elements of the voluntary manslaughter statute." *State v. Williams*, 38 S.W.3d 532, 539 (Tenn. 2001); *see State v. Lakeisha Jones*, No. W2000-02962-CCA-R3-CD, 2002 WL 1558690, at *6 (Tenn. Crim. App., at Jackson, Jan. 25, 2002), *perm. app. denied* (Tenn. Sept. 23, 2002). The trial court in this case gave a complete and proper voluntary manslaughter instruction. As such, the trial court did not abuse its discretion by not instructing the jury on mutual combat.

The Defendant's claim that the trial court erred because it did not instruct the jury on diminished capacity also has no merit. As long as the Defendant could and did present evidence on his mental capabilities at the time of the offense, and the jury was instructed on the proper mens rea requirements for each offense option, there is no need for an additional, separate diminished capacity instruction. *State v. Grose*, 982 S.W.2d 349, 354 (Tenn. Crim. App. 1997). In the case at bar, the Defendant presented numerous witnesses who testified about his mental capacity and

mental illness. Additionally, the jury was properly instructed on the mental states of "intentional," "premeditated," "knowingly," and "recklessly." As such, there was no need for an additional diminished capacity instruction.

Similarly, the trial court's instruction on insanity was not in error. Although the Defendant requested a particular version of the insanity instruction, the trial court gave its own jury instructions on insanity:

> Defense, insanity: Defendant has raised the defense that he was insane at the time of the commission of the offense.
>
> A person is not responsible for criminal conduct if, at the commission of the acts constituting the offense, the person, as a result of a severe mental disease or defect, was unable to appreciate the nature of his actions or the wrongfulness of his acts. A mental disease by itself is not a defense. The terms "mental disease or defect," do not include any abnormality manifested only by repeated criminal or otherwise anti-social behavior.
>
> The defendant has the burden of proving the defense of insanity. For you to return a verdict of not guilty by reason of insanity, the defendant must prove both of the following things by clear and convincing evidence:
>
> One, he had a severe mental disease or defect at the time that the acts constituting the crime were committed; and two, that as a result of this severe mental disease or defect, he was not able to appreciate the nature of his actions or to appreciate the wrongfulness of his actions.

As long as the instructions given correctly state Tennessee law and adequately cover the subject matter at issue, there is no error on the trial court's part. *State v. Karen Cooper*, No. 03C01-9109-CR-0035, 1992 WL 81942, at *2 (Tenn. Crim. App., at Knoxville, Apr. 23, 1992) (citing *Shell v. State*, 584 S.W.2d 231, 235 (Tenn. Crim. App. 1977)), *perm. app. denied* (Tenn. Jul. 6, 1992); *see State v. Larry Dean Dickerson*, No. W2000-02201-CCA-R3-CD, 2001 WL 1042128, at *4-5 (Tenn. Crim. App. at Jackson, Sept. 10, 2001), *perm. app. denied* (Tenn. Feb. 11, 2002). We conclude that the given instructions correctly state the law and adequately cover the subject matter. T.C.A. § 39-11-501 (2005). As such, the Defendant is not entitled to relief on this issue.

F. Sentencing

The Defendant signed a waiver allowing the trial court to sentence him under the new Sentencing Guidelines of 2005. The trial court sentenced him to twenty-five years, which is the maximum sentence allowed for a Range I, class A felony. At the sentencing hearing, the trial court explained the weight it gave to the evidence provided as mitigating and enhancing factors to arrive at the twenty-five year sentence:

This is a tragic situation, and I have read through the letters that are heart wrenching, but starting first with the Jones family, Isaac Jones, Sr., Tina Carter, other family members: They're good people. There may be some mental illness that, that's [sic] afflicted in the family, but they believe in hard work, education, to get ahead.

I was really impressed that, of Ms. Carter, that when Isaac Jones was spitting at the school, that she took a tissue and cleaned it up. That shows the type person she is and the type person that Isaac was. So it really is a shame that, that I have to sentence him, but that being the law, I must do so.

This killing should never have occurred. As Ms. Green said, there are so many reasons why it should not have and would not have except certain things did happen.

But Ms. Jacks was not trying to arrest him; she was trying to help him. She was trying to stop him. There was no arrest warrant out for him at all. The officers at Chattanooga State and the Chattanooga Police Department were trying to help him.

They took him to the hospital so that he could be seen by doctors and, if necessary, sent to Moccasin Bend, and he ran away from there. And she did try to stop him and encountered him, and there's some difference in testimony about what happened, but the Court finds that what did happen was that when she tried to stop him, he did slam her to the ground, as the little boy said, and the testimony showed that her pistol belt was twisted around in front, and her last words were "Oh, God! He's going for my gun."

So the court does find that he did get her gun. She didn't have her gun out. No reason at all to have had it out before. And the jury did find him guilty of knowing.

Considering the enhancing factors, the Court does, of course, find that he has a previous history of criminal convictions and behavior, but I do not give much weight to that because I don't think his prior record was that much.

And then enhancement factor 9, "the defendant possessed or employed a firearm." There is no question that he did that, and that is a terrible thing when it is used against a police officer. The thin blue line is what really separates us from chaos, and we would have complete chaos without it. I give great weight to that factor.

And in mitigation, I do find that – I do not find number 6, his youth.

I do find number 8, that he was suffering from mental illness, and I do find number 10, that he did help find the pistol.

> I do find number 11, that "although he committed the crime, he committed the offense under such circumstances it is unlikely that a sustained intent to violate the law motivated his criminal conduct.
>
> And then on the other 38 nonstatutory factors, as I said, I am – they can be lumped together in the category of bad childhood, good behavior when incarcerated or on probation in California, lack of violent or criminal behavior, defendant's determination to better his life and be a productive citizen. He was going to school, he was trying hard at school and was preparing to start a career for himself.
>
> But I do not give much weight to the mitigating factors, and I do find great weight in the enhancing factor of the use of a weapon.
>
> And regardless of whether I sentence him under the old act or the new act, I would set the maximum at 25 years. I think the killing of a police officer warrants the maximum sentence, so I set it at 25 years.

This court will review the sentence de novo with a presumption of correctness. T.C.A. § 40-35-401 (2005). The trial court begins sentencing by considering mitigating factors and jury-found enhancing factors, and using such findings to assign a sentence within the statutory range. T.C.A. § 40-35-210 (2005). The mitigating factors considered may include, but are not limited to, those in Tennessee Code Annotated section 40-35-113. The enhancing factors considered may include, but are not limited to those listed in Tennessee Code Annotated section 40-35-114. *State v. Robert Linder*, No. E2004-02848-CCA-R3-CD, 2006 WL 2714266, at *6, n.3 (Tenn. Crim. App. At Knoxville, Sept. 22, 2006) (stating "Effective June 7, 2005, Tennessee Code Annotated sections 40-35-114 and 40-35-210 were rewritten in their entirety . . . These sections were replaced with language rendering the enhancement factors advisory only.), *perm. app. denied* (Tenn. Jan. 29, 2007). The trial court in this case weighed the mitigating and enhancing factors and explained the weight given to each. Additionally, although the trial court seemed to base the sentence on the non-statutory factor that the Defendant killed a police officer, this is acceptable under the current statutory scheme. As such, the Defendant is not entitled to relief on this issue.

III. Conclusion

We find that the trial court did not err by not asking the Defendant if he wanted to testify and not letting the Defendant's experts testify to the ultimate issue of insanity. We also find the trial court did not err by allowing the State to close its argument with a potentially misleading statement about the insanity defense and by allowing the jury to hear the Defendant's prior bad acts. Finally, we find that the trial court correctly instructed the jury and sentenced the Defendant to twenty-five years in prison. In accordance with the foregoing, we conclude that the trial court committed no error. Therefore, the judgment of the trial court is affirmed.

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ROBERT W. WEDEMEYER, JUDGE